

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 174 (LC)
Case No: LP/22/2018**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – restriction preventing vehicular access from Poolbrook Road – whether restriction obsolete – whether restriction secures to the objectors practical benefits of substantial value or advantage – whether modification would cause them no injury – section 84(1)(a)(aa)(c) Law of Property Act 1925 – application allowed in part

**IN THE MATTER OF AN APPLICATION UNDER SECTION 84
OF THE LAW OF PROPERTY ACT 1925**

BETWEEN:

CAROLE ANN GREEN

Applicant

and

RICHARD AND JANET HAYES-HALL

Objectors

**Re: 79 Britten Drive,
Malvern,
Worcestershire,
WR14 3LG**

P D McCrea FRICS

**Sitting at Worcester Justice Centre
on
22 May 2019**

The applicant and the objectors all appeared in person.

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DECISION

Introduction

1. This short decision concerns an application by Mrs Carole Ann Green in respect of her property, 79 Britten Drive, Malvern WR14 3LG (“the application land”). Whilst the application land has frontage to Poolbrook Road, the B4208, a restriction on the title prevents vehicular access to and from it. Instead, it is necessary to take a triangular route along Poolbrook Road, via Longridge Road and Britten Drive, to access the application land from the rear – a journey of nearly half a mile.

2. Mrs Green applies to the Tribunal to modify the restriction to enable her to gain direct vehicular access to and from Poolbrook Road. The modification is objected to by the beneficiaries of the restriction, Mr and Mrs Richard and Janet Hayes-Hall who live nearby at Littlewood House, 172 Poolbrook Road. Whilst being close neighbours, relations between the applicant and the objectors are far from close. Indeed, during my site inspection which took place on 21 May 2019 it became apparent that they had never met each other until then, although had corresponded.

3. At the hearing on 22 May, both parties represented themselves.

Facts

4. Littlewood House, is a Grade II listed building dating from the 17th century, and was formerly the home of the romantic novelist Barbara Cartland. It has a long frontage and vehicular access to Poolbrook Road. By way of a transfer dated 27 September 1977, much of the grounds were sold to a Mr Peter Maurice Haynes for the development of bungalows which would be accessed not from Poolbrook Road but from a cul-de-sac to the rear, Britten Drive. Mr Haynes sold on, and the conveyance that is the subject of the application (“the conveyance”) is dated 15 September 1978 between Mr Haynes and M.J. Lowe & Sons (Builders) Ltd. The application land was acquired at a different time than the other plots, but nothing turns on that for the purpose of this decision.

5. The application land comprises a broadly rectangular plot accessed from the west by a long private drive from Britten Drive. The eastern boundary to Poolbrook Road has a close-boarded fence with a pedestrian gate to the pavement, and is the boundary from which, if successful in this application, vehicular access would be gained. The southern boundary adjoins 170 Poolbrook Road, and, further along to the west, Littlewood House. The northern boundary adjoins 156 Poolbrook Road. The western boundary adjoins 77 Britten Drive and a scout hut.

6. The scout hut is accessed by Dukes Way, which runs from Poolbrook Road a short distance away to the north. It is a narrow cul-de-sac formed in a T-shape, in which the southernmost

element of the T provides access to the scout hut. To the west of Dukes Way is a large sports field. It is relevant to submissions summarised later in this decision to note that, in theory at least, vehicular access to the sports field could be gained via the application land, the scout hut and 77 Britten Drive.

7. The application land has three main buildings. In addition to her house, Mrs Green built a bungalow in the north west corner having obtained planning permission on 28 May 2008. On 16 August 2007 planning permission was granted for vehicular access to Poolbrook Road, and on 12 September 2011 planning consent was granted for a detached garage in the southeast corner of the land, with vehicular access from Poolbrook Road. Despite not having vehicular access owing to the restriction which I detail below, Mrs Green built the garage. She has also built a large conservatory on the southern elevation of her house.

8. In summary therefore the application land contains Mrs Green's house, 79 Britten Drive; a small bungalow in the northern corner known as 77A Britten Drive (both of these buildings being vehicularly accessed via Britten Drive and the private drive); and a detached garage close to the Poolbrook Road boundary which is currently land-locked and cannot be accessed by vehicles. I should mention at this stage that even if the application were successful, whilst vehicles would be able to access the garage they would not, at least under the present building configuration, be able to access the bungalow nor the private drive from Poolbrook Road.

9. At the junction of Longridge Road and Poolbrook Road, some way south of the application land, there are long term planning proposals for a significant mixed-use development on the QinetiQ site, formerly the Royal Signals and Radar Establishment.

The restrictions

10. The conveyance contained various restrictions in clause 2 expressed to be for the benefit of Littlewood House. These included, at (c):

“For the benefit and protection of the said adjoining and neighbouring property of the vendor known as Littlewood House aforesaid or any part or parts thereof and so as to bind to the property hereby conveyed into whose ever hands the same may come the purchaser hereby covenants with the vendor and its successors in title that the purchaser and his successor in title will: -

not permit the land to be used for vehicle access purposes to Poolbrook Road.

11. Clause 2(d) was a positive obligation, binding on the original purchaser to:

“Erect immediately on completion and forever afterwards maintain a 6ft high interwoven fence between the points “A-B” on said plan and plant a screen of cypress trees between the points marked “A-C” and “D-E” on the said plan (planted at intervals of two and a half feet).”

12. The point marked C referred to in the conveyance is the point on the boundary with Littlewood House which forms the southern west corner of the main plot of the application land before it narrows to form the private drive.

13. Mrs Green's applies to modify restriction (c), suggesting the following wording, to permit:

“Vehicular and pedestrian access is permitted from Poolbrook Road to extend to point “C” within the curtilage of 79 Britten Drive. Specifically, the restriction prevents construction of a through road from Poolbrook Road to Britten Drive, in any form, whether vehicle or pedestrian, as a detriment/burden to all lands and boundaries within a 200m radius.”

14. The application is brought under sub-sections (a) (aa) and (c) of section 84(1) of the Law of Property Act 1925.

Statutory provisions

15. As far as relevant to the application, Section 84 of the Law of Property Act 1925 provides as follows:

“The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete, or

(aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes . . . or, as the case may be, would unless modified so impede such user;
or

...

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1) (aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition.”

The case for the applicant

16. In the absence of any expert evidence, it is necessary only to outline the parties’ positions in fairly brief form, omitting the written and oral material that had no relevance to the application.

17. Mrs Green submitted that the restriction is obsolete and inappropriate for modern living and ongoing environmental changes. She said that the development of the Qinetiq site will have an effect on the traffic flow on the cul-de-sac. She submitted that the restriction appears to pertain to the builder whilst her home was under construction rather than for practical living. In initial correspondence between the parties, the objectors had raised concerns about a through road along the northern boundary of Littlewood House. Mrs Green said that she had therefore designed the wording of the modification to prevent this occurring.

18. Mrs Green submitted that she had behaved reasonably, and obtained planning permission where necessary. She had catered for the objectors’ concerns, and in any event a through road from Poolbrook Road would be detrimental to her, would devalue her home and would fail on a variety of statutory grounds. In summary, Mrs Green submitted that the restriction was obsolete

under ground (a) that it did not secure to the objectors a practical benefit of substantial value or advantage under ground (aa) and would cause them no injury under ground (c).

The case for the objectors

19. Mr Hayes-Hall submitted that Mrs Green's specific proposals and his and his wife's specific objections were not where the matter ended. He had a duty as the current custodian of Littlewood House to protect its interests and stressed that the modification of the restriction, if successful, would be in perpetuity. He said that his solicitor also acted in the conveyance, and submitted that the original purpose of the restriction was not, as Mrs Green suggested, applicable to when the houses were being built. Its purpose was to protect Littlewood House. That purpose remained, and the restriction was far from obsolete.

20. He raised the objectors' concerns about the playing field on Dukes Way being developed at some point in the future and submitted that if the restriction were modified as Mrs Green suggested, it would, in theory, permit a vehicular access to the development land. It was not beyond imagination that a developer would find it profitable to relocate the scout hall and demolish some or all of 77-77A and 79 Britten Drive in order to gain vehicular access to the development site. It was this that was the thrust of the objection, not necessarily Mrs Green's need to access the garage that she had built in the garden.

Discussion

21. Dealing first with the application under ground (a), I am not satisfied that Mrs Green has shown that there are any changes in the character of the property or the neighbourhood or any other circumstances which would render the restriction obsolete. I accept Mr Hayes-Hall's submission that the purpose of the restriction was to protect Littlewood House and I am satisfied that that purpose can still be achieved. The fact that there are proposals for a large development some distance away does not demonstrate that the character of the neighbourhood has changed. The application land and the houses around it are all largely unchanged from shortly after the restriction was entered into. I am satisfied that the original purpose of the restriction remains the same and can be achieved by the maintenance of the restriction. The application under Ground (a) therefore fails.

22. I can deal with the application under grounds (aa) and (c) together, and in doing so allow a modification of the restriction, but to a more limited degree than applied for. I would say at this point that had relations between the parties been more constructive it is difficult to think that they would not between themselves have come to this, or something like it, as a solution.

23. Under ground (aa), the first question is whether or not the proposed user is reasonable. On the face of it accessing a vehicular garage from a main road, where adjoining properties have similar accesses is not unreasonable and Mrs Green has the benefit of planning consent for it. In

fairness to the objectors, they agreed this to be the case. There is no doubt however that the restriction impedes that user and I am satisfied that in doing so it secures to Mr and Mrs Hayes-Hall a practical benefit. In dealing with the application as drafted, I am satisfied that the ability to prevent traffic from Poolbrook Road through to the potential development of the sports field is of substantial advantage to them. I heard no expert evidence or indeed lay evidence as to values and it is not necessary for me to determine whether impeding the user is a benefit of substantial value to Mr and Mrs Hayes-Hall – advantage alone is sufficient.

24. It follows from this that modification of the restriction would cause injury, and I am satisfied that, as drafted, the application should be dismissed.

25. However, as I indicate, there seems to me to be a middle ground. At the hearing Mrs Green indicated that she would be content with a revised version of her proposed modification allowing her to access her front garage from Poolbrook Road but with vehicular access being restricted to that extent only, and specifically not to extend as far back as point C. This would prevent a through-road to either Britten Drive or to any potential development site on the sports field.

26. Mr and Mrs Hayes-Hall indicated that they would have no objection in principle to this revised form of modification although Mr Hayes-Hall latterly suggested that there should be compensation if the modification on that limited basis was to be allowed and suggested, initially at least, that this should be based on a percentage of the value of Mrs Green's property. I reminded the parties that the Tribunal may direct the applicant to pay an objector a sum to make up for any loss or disadvantage suffered by the objector in consequence of the discharge or modification and that claims for compensation on a profits or ransom basis seldom, if ever, succeeded.

27. The question is whether this limited modification would justify an award of compensation to the objectors for any loss or disadvantage suffered. I am satisfied that the modification of the restriction on this limited basis would not cause any injury to Mr and Mrs Hayes-Hall. Indeed, the number of vehicles passing their boundary would probably decrease. I therefore find that no sum is payable to make up for any loss or disadvantage to them.

28. In the absence of any expert evidence, and in order to provide a reference point for a limited modification, I have considered the plans attached to the planning permission for the garage and entrance granted by Malvern Hills District Council (11/01189/HOU) on 17 November 2011. I determine that the restriction should be modified to allow vehicular access from Poolbrook Road to enable access only to the garage and turning area as shown on drawing no.3449a dated July 2011 that formed part of that application but to no other parts of the application land.

Disposal

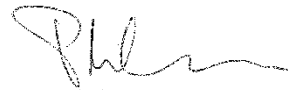
29. I determine that the restriction set out in paragraph 10 above, relating to title no. WR102242, shall be modified as follows pursuant to ground 84(1)(c) of the Law of Property Act 1925.

30. Clause 2(c) of the conveyance dated 15 September 1978 between Peter Maurice Haynes and M.J. Lowe & Sons (Builders) Ltd shall be replaced as follows:

“Not to permit the land to be used for vehicular access to or from Poolbrook Road beyond the garage and turning area shown on drawing 3449a attached to planning consent 11/01189/HOU granted by Malvern Hills District Council on 17 November 2011. For the avoidance of doubt vehicular access is permitted to and from Poolbrook Road to the garage erected in accordance with that planning consent and to the turning area shown.”

31. An order modifying the restriction in clause 2 of the conveyance dated 15 September 1978 referred to above shall be made by the Tribunal provided that, within three months of the date of this decision, the applicant shall have confirmed her acceptance of the proposed modification.

32. This decision is final on all matters other than of the costs of the application. The parties may now make submissions on costs and a letter giving directions for the exchange and service of submissions accompanies this decision. The attention of the parties is drawn to paragraph 12.5 of the Tribunal’s Practice Directions dated 29 November 2010.



P D McCrea FRICS

4 June 2019